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April 4, 2007

Via Email, Facsimile and U.S. Mail
Tami R. Bogert, General Counsel
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95184

Re: Comments on Proposed Revisions to PERB's Card Check Recognition Regulations

Dear Ms. Bogert:

As counsel to American Federation of State, County and Municipal Employees Local 3299, International Federation of Professional and Technical Engineers Local 21, Public Employees Union Local One, and University Professional and Technical Employees, Communication Workers of America Local 9119, we are submitting the following comments regarding proposed new regulations on the subject of card check recognition. We welcome steps to provide guidance to employees, employee organizations, and employers in this important area of law. However, we believe there are several problems with the proposed regulations that ought to be addressed before they are enacted.

I. Sections 32705, 61025, 81025, and 91205, Regarding Revocation of Proof of Support, are Unworkable and Contrary to Law as Presently Written, but This Problem Can Be Easily Fixed Via Several Minor Changes

We see three main issues pertaining to the proposed rules on revocation. First, subsection (b)(4) of proposed sections 32705, 61025, 81025, and 91205 would allow revocations after the petition or request has been filed, up until "the last day of the posting period applicable to the petition or request, or, with respect to a unit modification petition, within 15 workdays of the date proof of support is filed." This rule apparently is intended to permit revocations for a period of approximately 25 days following most petitions for recognition.

Such a rule not only would lead to delays, confusion, and administrative difficulties, but would contravene the authorizing statutes and well-established law, both of which require only

that a union have obtained majority status as of the time that it petitions for recognition, irrespective of later revocations that may occur.

The statutes authorizing certification without an election do not grant the employer or employees a window of opportunity to revoke after the union petitions for recognition. These statutes direct that employers must recognize a union upon request and with proof of majority support; the laws do not require the union to show that it can maintain its support over a given period of time, which is what the proposed regulations would effectively require. Cal. Gov. Code §§ 3507.1(c), 3544(a), 3544.1, 3573, 3574, 71636.3(c), 71823(a)(5). *See Antelope Valley Health Care District* (2006), page 11 ("We find the statute to enunciate the clear requirement that the employer must grant recognition upon a showing of majority support.").

Indeed, the proposed rule is contrary to how the law is regularly applied in a variety of contexts: for example, if an employee that signed an authorization card resigns after a petition is filed, this would have no bearing on the Board's determination of proof of support—the Board would still rely on the cards and employee list at the time recognition is requested.

Similarly, well-established federal precedent requires that determinations regarding majority status be made on a snapshot basis, such that revocations are effective only if they are made prior to the recognition petition. *See Quality Markets, Inc.*, 160 NLRB 44, 53 (1966); *Stanley Air Tools*, 171 NLRB 388, 395 (1968) ("[E]ven if . . . revocations were obtained without any interference or coercion, they would have no effect [if] they were obtained after the demand for recognition was made at which time the Union already represented a majority of the employees") (citing *Cedar Hills Theatres, Inc.*, 168 NLRB 871 (1967)). This is true both when the NLRB imposes a bargaining order and where a card check agreement is enforced. *See Quality Markets, Inc.*, 160 NLRB at 53; *Alpha Beta Co.*, 294 NLRB 228, 230 (1989).

Not only does the law require PERB to consider revocations only through the time that the union files its recognition petition, but other concerns point in the same direction. Under the proposed rule, during the first 25 days or so following petitions for certification (at which point the employer knows of the union's claim of majority status and an order directing recognition is imminent), employers would have a tremendous incentive to pressure employees into revoking authorization cards or other proof of support. Insofar as employers are successful in causing revocations, unions will respond by attempting to perfect support, leading to further delays.

In order to resolve these issues and bring PERB's regulations in line with well-settled law, the regulations must be amended to require that revocations be submitted on or before the date that the union files its petition or request for recognition. On page 4 of this letter, we suggest particular language to resolve this issue and to simultaneously resolve a second issue, to which we now turn.

The second problem evident in the proposed regulations occurs in subsections (b)(2), (b)(4) and (c) of proposed sections 32705, 61025, 81025, and 91025. Th to think you ese

provisions could be read to mean that revocations need not be sent to the union holding the employee's authorization card, and/or that PERB will never disclose to unions which authorization signatures have been revoked. An employee's failure to send revocations to the union, however, is contrary to law, will lead to unnecessary delay, administrative difficulties, and an inability to determine whether coercive employer conduct is the cause of the revocation.

Under federal law, revocations must be directed to the union to be valid; the union, after all, is the one holding the authorization signatures. *J.P. Stevens & Co.*, 244 NLRB 407, 431 (1966) ("Under well established Board policy an authorization card is not to be deemed effectively revoked in the absence of notification to the Union or an agent thereof").

The federal rule is also premised, in part, upon the fact that some revocations are caused by unlawful employer conduct. *See, e.g.*, *Stanley Air Tools*, 171 NLRB at 395. If an employer's unlawful conduct caused an employee to revoke authorization, the employee is unlikely to come forward and expose this without being asked. But if the union is unaware which employees have revoked authorization, it is unable to investigate and cannot determine if any revocations are due to the employer's unfair labor practices. This greatly harms PERB's ability to discover coercive employer conduct. It is in PERB's best interest and in employees' best interests to allow unions to function as a check on the potential for employer coerced revocations by requiring revoking employees to notify both the union and PERB of revocations.

Furthermore, the federal rule requires revocations to be sent to the union because otherwise the union will not know whether it has majority support and from whom. PERB's proposed rule would lead to unions – unaware of relevant revocations – requesting certification from PERB when in fact there is insufficient support. Unions would be hampered in later trying to perfect support because they will not know which signers have since changed their minds: they would be unable to inquire why a particular supporter has revoked authorization nor would they be able to answer that person's concerns, because they would not know who that person is. This would lead to more delay, and when the union reaches actual majority support, the union would simply request recognition again. PERB, of course, would have to administer and oversee all of this. The situation could be avoided, though, if the union knew from the beginning who had revoked authorization, because then the union could simply avoid filing until it had a genuine majority.

Finally, PERB, as the only party receiving revocations, would have to file away and keep track of revocations for ongoing petitions that have not yet, and may never, lead to a request for recognition. PERB would receive letters revoking authority, but it could often be unclear what employer or organizing campaign was being referenced. PERB would have to try to match up revocations with recognition requests potentially filed much later, which is an additional administrative burden on PERB. If the union knew already that a given signature was revoked, the union would not count it toward majority support and there would be less of a burden on PERB to play this matching game on its own.

To solve the foregoing problems, the language of subsections (b)(2) and (b)(4) of proposed sections 32705, 61025, 81025, and 91025 should be replaced with the following language requiring that authorization cards:

> **(2) Be contained in an individual card or letter signed by the employee furnished to PERB and the employee organization by the employee.**
>
> **(4) Be filed with PERB and the employee organization on or before the date that the request or petition for recognition is made.**

The third and final problem with the regulations pertaining to revocations is that these regulations fail to explicitly note well-settled law invalidating revocations made in the context of employer unfair labor practices. *Waste Management of Utah*, 310 NLRB 883, 910, fn. 130 (1998) ("The Board regards an attempted revocation 'after the onset of the coercive conduct' to be a result of that conduct and thus 'ineffective'") (quoting *Lott's Electric Co.*, 293 NLRB 297, 312 (1989)); *Dlubak Corporation*, 307 NLRB 1138, 1174 (1992); *Mayfield Produce Co.*, 290 NLRB 1083, 1088 (1988).

While PERB's regulations no doubt implicitly accept this principle, to the extent that PERB is attempting to make explicit what the rules are concerning revocations, PERB should address this well-settled rule in its regulations. Specifically, a new subsection (c) should be added to sections 32705, 61025, 81025, and 91025, and the currently proposed subsection (c) should be relettered as subsection (d). The new subsection (c) should read as follows:

> **(c) Revocations made after the employer has committed unfair practices are not valid, unless the employer can demonstrate by a preponderance of the evidence that the revocations are not the product of unfair practices.**

II. Sections 32700, 61020, 81020, and 91020, Regarding Proof of Support, Conflict with Supreme Court Precedent and Would Be Particularly Problematic If They Were Made Retroactive

Under subsection (a)(1) of proposed sections 32700, 61020, 81020, and 91020,

> Proof of support submitted with a request or petition requiring recognition of the petitioning employee organization as the exclusive representative of affected employees without an election must also clearly demonstrate that the employee understands that an election may not be conducted.

This proposed rule would not only fall outside the language and intent of the authorizing labor relations statutes,[1] but also would conflict with Supreme Court precedent holding that a bargaining order based upon a showing of majority support is appropriate, without an election, even if employees were unaware that their authorization cards might be used in this manner.

As the Supreme Court summarized in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 584 (1969), an authorization card is sufficient for purposes of issuing a bargaining order, without an election, "if the card itself is unambiguous (i.e., states on its face that the signer authorizes the Union to represent the employee for collective bargaining purposes and not to seek an election), . . . unless it is proved that the employee was told that the card was to be used solely for the purpose of obtaining an election." Following this unequivocal Supreme Court precedent, the NLRB has held that a bargaining order is appropriate, without an election, regardless of whether the union can clearly demonstrate that all signing employees knew the union could be recognized without an election. *Greyhound Lines, Inc.*, 235 NLRB 1100, 1108 ("*Gissel* makes clear that a union has no affirmative obligation to inform employees that recognition may be obtained without an election"); *DTR Industries, Inc.*, 311 NLRB 833, 839 (1993) ("[W]here the card on its face clearly declares a purpose to designate the union as collective-bargaining representative, the only basis for denying face value to the authorization card is affirmative proof of misrepresentation or coercion") (citing *Levi Strauss & Co.*, 172 NLRB 732, 733 (1968)).

Note also that PERB's current and proposed regulations recognize several forms of proof of support, including documents that would not indicate the kind of subjective understanding contemplated by this proposed regulation, such as notarized membership lists and membership are petitions. *See* § 32700(e). Thus, PERB's proposed regulation would lead to substantial litigation over employees' subjective understanding, whereas the Supreme Court's rule, as discussed immediately above, avoids such needless litigation, except in unusual cases where misrepresentation or coercion by a union representative is alleged.

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[1] The statutes that mandate recognition without an election require neither that employees fully understand the recognition process, nor that unions demonstrate employees' understanding of the process, let alone that employees affirmatively agree to recognition without an election. *See* Cal. Gov. Code §§ 3507.1 (under MMBA, exclusive or majority recognition must be granted upon a "showing that a majority of the employees in an appropriate bargaining unit desire the representation"), 3544(a), 3544.1 (under EERA, exclusive representation must be granted upon request and with proof of majority support "designating the organization as the exclusive representative of the employees), 3573, 3574 (under HEERA, exclusive representation must be granted upon request and with certification that "proof of majority support has been submitted to either [PERB] or to a mutually agreed upon third party"), 71636.3(c) (under Trial Court Act, exclusive representation must be granted upon a "showing that a majority of the employees in an appropriate bargaining unit desire the representation"), 71823(a)(5) (under Court Interpreter Act, exclusive representation must be granted upon "presentation of a petition or cards with the signatures of 50 percent plus one").

If the rule is nevertheless adopted in any form, then it should clearly state that the rule is not retroactive, meaning that cards signed before the rule goes into effect need not comply with the new rule. Instead, any such rule should have an effective start date that gives unions enough time to begin circulating cards that comply with the regulation. Retroactivity in the absence of these provisions would be unfair and unworkable, because unions have been circulating authorization cards in multiple ongoing organizing drives since before the rule was proposed, as well as during the comment period, yet may not petition for recognition until after the rule takes effect. These unions would be forced to get new authorization signatures from employees solely to meet the requirements of the rule, which would be time consuming and costly. Moreover, there is no harm in making the rule prospective only, because existing law is already sufficient and fully compliant with Supreme Court precedent, as discussed above.

III. Sections 32784, 61470, 81470, and 91470, Relating to Determinations of Proof of Support, Should Be Slightly Amended

Under subsection (a) of proposed sections 32784, 61470, 81470, and 91470, "the employer shall, as directed by the Board, file with the regional office an alphabetical list . . . of all employees." This would change the regulations to remove the requirement that the list be filed "within 20 days of the date the petition was filed." *See* §§ 32784(a), 61470(a), 81470(a), 91470(a) (2006). However, as it is written, this allows employers to indefinitely withhold employee lists if, for some reason, the Board fails to direct the employer to submit them, even beyond the current twenty-day limit. This potential relaxation of the time period by which an employee list must be filed would result in greater delays in determining proof of support.

To avoid the foregoing problem, the proposed regulations should be redrafted to retain the twenty-day limit but allow an extension for good cause. It would read as follows:

> If proof of support has been filed pursuant to section 32781(e)(1) or (2) [61450(e)(1) or (2), 81450(e)(1) or (2), or 91450(e)(1) or (2), as appropriate], the employer shall, **within 20 days of the date the petition was filed,** file with the regional office an alphabetical list, including job titles or classifications, of all employees proposed to be added to the unit as of the last date of the payroll period immediately preceding the date the petition was filed with PERB, unless otherwise directed by the Board. **The employer can request an extension of the deadline upon a showing of good cause. Upon receiving such a request, the Board will confer with all parties to determine what, if any, extension is appropriate.**

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Thank you for your time and attention in considering these important matters, and we hope that you find the foregoing comments to be helpful.

Very truly yours,

LEONARD CARDER, LLP
Ari Krantz
Margot Rosenberg
Kate Hallward
Arthur Liou

By: _____
Ari Krantz